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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 630

NEW YORK LIFE INSURANCE COMPANY,
Petitioner,

vs.

VIRDIE SCHIEL, FRANK SCHIEL, SR.,
MARY LOU SCHIEL AND LORRAINE SCHIEL,
Respondents.

Brief of Respondents in Opposition to Petition for Writ of Certiorari

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INTRODUCTION

The opinion of the Court of Appeals, Ninth Circuit, in this cause is now reported in 178 F. 2d 729. The following argument in answer to the Petition and Petitioner's Brief takes up the points in substantially the same sequence.

STATEMENT OF MATTER INVOLVED

At the risk of some repetition, but because of some addition to the circumstances of the cause, this statement is made in connection with, and as it may differ in certain features from, the statement of the petitioner.

As a preliminary, respondents point out that the only admitted evidence in the cause was the Stipulation of Facts on reformation issue (R 45). At the time of reinstatement there was no offer to issue another policy similar to the original, as inferred in statement on page 3 of the Petition. The original was reinstated. No clause denominated "A" or denominated "Permanent" as added on reformation (R 26) was ever submitted to the insured. The undated letter is not denominated, and there was no evidence when that letter presented for signature by the company was signed. The opinion states these circumstances (R 120 to 122). There were other grounds on which reversal was justified, additional to and independent of those given by petitioner (Petition p.6) as being grounds of the majority and concurring opinions. These additional grounds were presented in the briefs and argument in the Court of Appeals and will be referred to later.

There is no evidence, except the Stipulation (45); there was no trial at which evidence was admitted to support the complaint.

In 1935 Frank Schiel Jr., the insured age 18, was issued the life policy. It had a two year incontestable clause, a "military" clause making it free of conditions of occupation and military service (R 15), and a reinstatement clause. It included Arizona statute requirements (Sec. 61-705 Ariz. Code Ann. 1939) that the policy constituted the entire contract and no statement shall be used in defense unless a

copy be indorsed upon or attached to the policy *when issued.* (R 15).

The policy lapsed in 1936 and insured applied for reinstatement in 1939. His application (in a part never attached to the delivered policy) stated that he was desirous of taking aviation training (R 21). The company demanded that he sign a request for cancellation of the double indemnity benefits, and that an aviation clause "A" be added. No reinstatement would be made otherwise (R 52). The policy was delivered as a reinstatement. It had the double indemnity clause stamped "Void" in large letters (R 9). But no aviation clause denominated "A", or of any kind, was indorsed or attached and no copies were given insured. After the reinstatement the company had the policy up again (R, 123).

The insured later became a member of the American Volunteer Group in China (R 67), and when this country declared war he remained and became a major in the air force. He was first reported missing, then as killed in action December 5, 1942. Death was allegedly due to "plane crash." All reports were hearsay as there was not any witness to any crash and the plane and his body were found in a remote region (R 68).

The company declined to pay and tendered the alleged reserve, claiming that death came under an aviation clause "A" (R 5). Beneficiaries had never seen or known of this clause which was not attached or with the policy left by the insured. The tender

was declined, and this suit was brought by the company, asking reformation on allegation of mutual mistake, and for addition of an aviation rider "A." The beneficiaries resisted, on the ground that the incontestable clause barred reformation; they denied any mutual mistake, and denied that death came under any rider, and defended on the ground, among others, that no clause "A" or any rider was attached when the policy was issued, either originally or on reinstatement; and demanded payment of insurance (R 28, 37).

Reformation, merely adding an aviation rider to the policy was ordered in 1945 (R 56); leaving open for final judgment whether, as claimed by the company, death occurred under conditions defeating the insurance, and for decision on other issues. No trial was ever held, although requested (R 37). The company on November 24, 1948, moved for summary judgment (R 62), which was granted, judgment being entered March 9, 1949. Respondents made a motion to set aside and for new trial. April 6, 1949, the court denied the motion. Appeal followed and the Court of Appeals reversed the judgments.

SOME QUESTIONS PRESENTED ON THE APPEAL BELOW AND INVOLVED IN IN THIS CASE

1. Was reformation properly allowed after more than two years stated in the incontestable clause had passed, or at all?

2. If reformation is allowed to stand, does an aviation rider merely added thereby destroy the assurances in the unchanged occupation and military clause, that had become incontestable, making the policy free of all conditions of such service, and of other clauses that had become incontestable?

REASONS WHY WRIT SHOULD BE DENIED

1. Petitioner states that the Court of Appeals has decided an important question of Arizona law contrary to applicable Arizona decisions. Respondents do not agree. But even if it were an important question, and the decision conflicted, this would be no ground for review, because there were other independent grounds for reversal of the judgments of the district court. And an appellate court affirms a judgment of a lower court where it is correct on any ground or theory disclosed by the record regardless of the ground, reason or theory, adopted by that court. *Frey* v. *Cudahy*, 256 *U.S.* 208; *Childers* v. *Commissioner*, 80 F.2d 27, (C.A.9th).

2. Petitioner states that the decision conflicts with decisions of other Courts of Appeal. This apparently relates to the ground of the concurring opinion that the "incontestable clause such as appears in the instant policy, precludes reformation." (R 130). This is a case where the decision was made by the Court of Appeals "in the light of the attendant circumstances" (R 123), and on "certain matters serving sharply to differentiate this from the mine run of the authorities bearing on the subject." (R 124).

The decision is in effect that under the circumstances of this case the insurer on reinstatement could not impose a condition excluding *certain* risks covered by the original policy. So it is not a case where any important general decision can be made applicable to cases having other attendant circumstances. The decision was, and must be, based upon the particular facts of this particular case, which are different from any other case.

3. The assertion of petitioner that the Court of Appeals decided a question of Arizona law, in the matter of reinstatement, contrary to Arizona decisions. is unsupported. The only Arizona case cited by petitioner is *Equitable* v. *Pettid.* This case was given full consideration and effect in the opinion (R 124). The opinion gave effect to the broadest rule that insurability comprehends moral hazards as well as health. There surely is no specific decision of the Arizona court that insurability would apply to allowing a reduction of risks by an aviation rider. (R 126). What might be a ruling, under the Pettid case which simply says in general terms that insurability involves "other elements than personal good health," is speculative. We do not believe that a Federal court is required to guess what a State court may do. Especially as in this Pettid case the question was on disability not life, insurance; and that court makes its decision "under the facts of this particular case." *Greber* v. *Equitable*, 43 Ariz., at page 13 (cited to the court of Appeals) holds that *life*

insurance does not include disability and disability insurance. "The mere fact that the disability provisions appear in a policy of life insurance neither changes the character nor makes applicable to their provisions the principles governing that class of insurance. They should be treated as though they were a separate policy covering only disability insurance." If insurability covers everything so that the insurer can require any conditions (R 128) then the "right" means nothing, and the reinstatement clause would be a deception for the insured.

The Court of Appeals here specifically follows the rule that "the term comprehends something more than good health" and refers to the Pettid case (R 123).

4. There is manifestly no plain error (both majority and concurring opinions show the Arizona cases were fully considered) which this Court mentions in *Francis* v. *Southern Pacific*, 333 U.S. 447: A plain showing of error is required for the Supreme Court to overrule lower Federal courts in their application of the rule that in diversity cases Federal courts are to apply state law. (R 126).

5. Even if the issue of reinstatement, or that of reformation, under the incontestable clause, were the only grounds on which the opinion of the Court of Appeals could be affirmed; and a decision of general importance could be made that would not be unnecessary for affirmance because of other grounds, this Court would not necessarily review. These

questions, that have new elements as different cases and states of facts continue to arise, do not appear ready for any standardized and all encompassing answers. They seem issues to which this Court had reference in *Maryland* v. *Baltimore Radio*, 94 L.Ed.40: "It may be desirable to have different aspects of an issue further illumined by lower courts. Wise adjudication has its own time for ripening."

ANSWERS TO ARGUMENT OF PETITIONER

No specific errors claimed to have been committed by the lower court are stated except as these may be inferred from the argument of petitioner. Respondents submit that there was and is no reversible error. The preceding part of this brief relates to many of the statements in the Argument of petitioner. We take up further some of the Argument:

On its heading A Conflict with Local Decisions: It has been pointed out that the opinions of the Court of Appeals conclusively show that Arizona decisions were carefully and fully considered and given full effect. And to claim that there was any "plain error" is unsupportable (*Francis* v. *Southern Pacific*, above cited). The Kirby case, asserted by petitioner to be almost on all fours, was carefully considered and distinguished (R 124 and 127).

The statement that the court below attempted to circumvent the Arizona rule by a distortion of the occupation clause, we submit is unjustified and wholly unsupported, and the carefully considered opinions

so prove. At the hearings that Court announced that this was an interesting case, and that the judges would interrupt to ask questions, which they did. Their questions showed clearly that Arizona laws and decisions would govern. We suggest that if there is any distortion it is in the interpretation placed upon that clause by petitioner. That construction would emasculate the occupation clause in favor of the insurer, and make it of no protection to an insured.

Petitioner, on page 15 of its brief, states "there would be no purpose in the Company including the condition regarding the requirement of evidence of insurability in order to effect a reinstatement." Under Arizona Statute that clause is mandatory. (Sec. 61-705,9-Ariz.Code Ann.1939).

Petitioner (pages 18, 19) infers that the Sussex rule holds that insurability is confined to good health. That is not so, as the opinion here, which did not confine the rule to good health, clearly shows R 127). *Belser* v. *Mutual Life*, 77 Fed. Supp.826, also holds that on reinstatement an exemption from war risk could not be required as a condition.

We believe that the statement (page 20) that the Court of Appeals made no apparent attempt to follow the Arizona Supreme Court, has no basis and seems unjustified. The questions at the hearing and the opinion show clearly their purpose to follow the laws and decisions of Arizona to the full extent applicable. The judge who wrote the concurring

opinion based upon the incontestable clause, also shows he was fully considering Arizona decisions. He surely would have referred to such decisions if there had been any (R 129).

On B Conflict Between Circuits (pages 20 and 21): The Lanier case (Cert. Denied 301 U.S. 693), also states, in addition to what petitioner quotes, "But it (reinstatement) results in putting the old contract back into force with its premium rates and premium dates and its general provisions unchanged." The occupation clause was *general* provision. This Lanier case seems favorable to respondents on the reformation issue.

On II Incontestable Clause (page 21): The concurring opinion based reversal on the ground that the incontestable clause precludes reformation (R 130). We think that was correct, as one of the several independent grounds requiring reversal. As it was not the ground the majority took, however, we do not see how there is any conflict of Circuit Courts. Further, as brought out by the concurring opinion, the facts of this case have "more justification than appeared in the Richardson case." In this case reformation was sought after death, destroyed the insurance protection, and the case is further distinguished from the Columbia and Richardson cases, because the insurer in bringing this suit deliberately made a contest. It alleged that insured was killed as a result of operating or riding in an aircraft (raising a clear issue of fact and a

contest) and requested a decree accordingly. R 5-7. So even if there be a conflict between the Columbian and Richardson, there is none because of different facts, between them and this case. A further distinguishing circumstance is that in the Columbian case the error to be corrected was simply a part that was already *in* the policy. This is quite different from asking to insert an outside clause and thereby prevent recovery of the insurance, as here (R 130).

Respondents have stated there were other independent grounds for reversal. To bring some of these more specifically to attention we repeat, in abbreviated form, some of the points and arguments in our briefs:

SUMMARY OF ARGUMENT PRESENTED TO COURT OF APPEALS

I. Reformation ordered in 1945 was prejudicial error because: Reinstatement in 1939 should have been permitted without demand by the insurer for elimination of risks; no "A" clause was attached to the policy when issued; no mutual mistake was shown; and this was a contest in violation of the incontestable clause.

II. But even if reformation was allowable, summary judgment for insurer was prejudicial error because:

A. If there had been competent evidence that death came under the aviation rider, the death was nevertheless a battle casualty in military service, a war and not an aviation risk; and

B. The clause making the policy free of conditions as to occupation and military service, which had become incontestable, and the clause making the policy incontestable after two years except for specific exceptions named therein, were not indorsed to show any restriction of the unlimited risks of military service (R 15); and such unindorsed clauses are superior to the rider which is an exception to risks (*Canton* v. *Woodside*, 90 Fed. 302).

C. These clauses, unindorsed and without fair notice of a modification of risks, if any change was intended, created ambiguities that must be decided favorably to beneficiaries.

III. Further, the giving of summary judgment was prejudicial error, because: The Findings, Conclusions and Summary Judgment (R 72) are not supported by any admitted evidence.

ARGUMENT

REFORMATION WAS PROPERLY REVERSED BY COURT OF APPEALS

The action of the District Court in ordering reformation by allowing any aviation clause or rider to be added to the policy after death of insured and after it had been reinstated for more than three years, was prejudicial error, because:

A. The company refused to reinstate the policy unless the insured signed a request (Form 2274) cancelling double indemnity and for addition of an aviation rider, denominated "A", which was never

submitted to insured for examination, and no clause labeled "A" was added on reformation or is now on the policy (R 121). The clause labeled "Permanent" was not requested by insured. The insured, untrained in insurance matters, received no consideration for signing that request. It violated his statutory right to have the policy reinstated with the same general provisions and risks. A change was made in the risks assumed (R 126); no change had occurred in health or insurability. If an insurer can ignore and avoid the reinstatement clause, and require a reduction in general provisions and risks assumed before allowing reinstatement, the "right" (R 123) is of no value. Belser v. Mutual Life, above; *Bowie v. N. Y. Life*, 105 F.2d 807 (CA 8th).

B. When the policy was reinstated and "issued" it did not have any aviation rider "A" attached. Insured was warranted in considering that the policy as issued was the final, acceptable to the company; and that he could rely on the unchanged occupation and military clause. The company, after his death, cannot equitably claim that the policy delivered on reinstatement was not one that the insured could depend on.

Federal Casualty v. *Howe*, 38 F.2d 741; *N. Y. Life* v. *Cohen*, 48 F.2d 903; *Corley* v. *Travelers*, 105 Fed 858; *N. Y. Life* v. *Hardison*, Mass., 85 N.E. 410; *McKelvie* v. *Mutual Benefit*, 287 Fed.660. *Stillman* v. *Aetna*, 240 Fed. 466 states: "The statute imposes upon the insurance company the duty of attaching

a true copy of any application for representations of the insured which by the terms of the policy are made a part thereof, and of the contract of insurance, or referred to therein, or which may in any manner affect the validity of such policy; and the omission to do so shall forever preclude it from alleging or proving any such application or representation. No amount of discussion can make this provision of the statute plainer or obscure its meaning."

C. To obtain reformation the company alleged a conclusion of mutual mistake (R 5). The insured had died and his version could not be given. The company had the policy up at least once after reinstatement to add the Settlement Agreement (R 17), and had opportunity then to correct errors if any (Opinion R 123). The stipulation of facts shows no clear and unequivocal evidence of such mistake, as is required. And the Conclusion of Law (R 54) that there was mutual mistake is not supported. It is clear that the mistake, if any, was that of the skilled employees of the company, and not mutual. The opinion indicates that the Court of Appeals found no mutual mistake (R 123 Note).

Dutton v. *Prudential*, Mo., 193 S.W.2d 938 states: On mutual mistake the evidence must be clear as to exclude any reasonable doubt. Mere preponderence is not sufficient. "Courts of equity do not grant reformation on probability . . . but only on certainty of error." *Metropolitan Life* v. *Asofsky*, 38 Fed.Supp. 464.

D. This policy had a two year incontestable clause. It was originally issued in 1935, was reinstated in 1939, suit for reformation was not brought

until July, 1943, after death of insured. Cancellation is not allowed after death of an insured (*Terry v. N. Y. Life*, 104 F.2d 501 CA.8th). Reformation, substantially like cancellation, should also be denied. The suit here was a contest (R 117). The order allowing reformation violated the incontestable clause.

Richardson v. *Travelers*, 171 F.2d 669; *Mutual Life* v. *Markowitz*, 78 F.2nd 398 CA.9th; *N. Y. Life* v. *Kaufman*, 78 F.2d at 403; *Horwitz* v. *N. Y. Life*, 80 F.2d 297; *N. Y. Life* v. *Hiatt*, 140 F.2d 752; *Mutual Reserve v. Austin*, 142 Fed.402; *Wright* v. *Mutual Benefit*, N. Y., 16 Am. St. Rep. 749; *Travelers* v. *Henderson*, 69 F. 2nd 762; *Blatz* v. *Travelers*, 68 N.Y. S.2d 801; *Bernier* v. *Pacific Mutual*, La., 88 A.L.R. 765.

We submit that as decided by the Court of Appeals, reformation should not have been allowed, on the grounds stated in the opinion and on any of the other grounds.

II

REFORMATION WAS ONLY ONE GROUND FOR REQUIRING JUDGMENT FOR FOR THE BENEFICIARIES

Even if reformation had been allowed to stand, that was not the only ground for reversing the judgments. The reformation simply added a rider (undated letter and an indorsement, neither denominated "A"); no other clause was requested to be re-

formed (R 6). All other clauses had become incontestable. Anything in the added aviation rider that conflicts with these clauses can be of no effect to violate them.

Can an insurer, by adding a separate exception-to-risk rider having a blanket statement "Anything in this Policy to the contrary notwithstanding," charge an applicant with notice that other clauses not indorsed to show any change, are not true statements to be relied on. The clause here (R 29) making the policy free of conditions as to occupation, and military, states the only exceptions relate to double indemnity and disability benefits. If another exception can be included in a separate clause in another part of the policy, then an inexperienced applicant is misled, and deceived, when he reads the free occupation clause; and insurance is uncertain and dangerous for any one who is not an expert in contract interpretation.

In the Hiatt case, above, the Ninth Circuit court says in regard to notice: "Here the insurer could easily have avoided ambiguity and eliminated all deceptive repugnancy by adding to the stamped matter some brief expression calling attention to the limitations contained in the rider. If for example, the declaration had read 'Double Indemnity for accidental death, as restricted and defined on page 5 hereof' or language of similar import."

If a reformation, by adding a rider, could change all other clauses that have not been specifically reformed, and so indorsed, then incontestability is defeated.

The reinstatement and incontestable clauses, as well as others, are required to be in all life policies by Arizona Statutes (Secs. 61-705 and 707 Ariz. Code Ann.1939). The military clause had become incontestable. It seems axiomatic that if anything in an added aviation rider conflicts with the military clause, the latter must stand unchanged.

Further, the summary judgment was prejudicial error under the policy as allowed to be reformed by the district court;

A. It admitted that death was a battle casualty (73); and if there had been proof, or if it be conceded for purpose of argument, that death was due to plane crash occurring *within* the aviation rider, the death was notwithstanding due to a risk of war. It was not a risk of aviation, it was a risk of war brought about or contributed to, perhaps, by plane crash, instead of shell explosion or some other military condition.

Boye v. *U. S. Service Life*, 168 F.2d 570 CA. Dist. Col: Boye was pilot of a plane on a bombing mission to Germany in 1944. He was reported missing. The plane was last seen over Germany. It was believed to have been lost as a result of enemy anti-aircraft fire. The policy had an aviation clause. The appellate court reversed a judgment for the insurer. It said it agreed with the district court that "the known circumstances point strongly to death by enemy gunfire, or by flames from a burning plane or *by plane crashing upon the land* or falling into the sea. But we cannot agree that death so caused is 'due to operating or riding in any kind of aircraft'." It resulted "from a risk of war that the policy did not exclude."

Also *Bull* v. *Sun Life*, 141 F.2d 456, cert. denied 323 U.S. 723; *Schifter* v. *Commercial Travelers*, 50 N.Y.S. 2d 376, affirmed 54 N.Y.S. 2d 408; *Paradise* v. *Travelers*, 52 N.Y.S. 2d 290 and *Durland* v. *N. Y. Life*, 61 N.Y.S. 2d 200.

B. The clauses (R 15) in the policy making it free of conditions of occupation and military service, and incontestable after two years, were never indorsed with any modification. These unindorsed clauses are superior to any after inserted exception, as an aviation rider, if the latter purported to change the other clauses and the military risks assumed. The rider says nothing about military risks. If it did, that would not be sufficient without indorsement also on or in the military or other clauses themselves. The rider when considered in connection with the occupation clause left unindorsed, is reasonably interpreted to refer to non-war aviation. Statements in other parts of the policy are not notice of a change in the occupation clause. In the Hiatt case the court said "The printed general reference (on the front page) to all provisions found on the ensuing pages does not fairly reach the point."

The Durland case, above, also shows that the New York Life, on the same kind of policy with the same aviation and military clauses as here, but issued about two years later, placed clear indorsement *on* the military clause itself "Except as provided by Aviation Rider Attached hereto." This company thus recognized the necessity for such indorsement.

See *Mutual Reserve* v. *Austin*, above; *Provident*

Life v. *Anderson*, 166 F.2d 492; *Ness* v. *Mutual Life*, 70 F.2d 59; *Bernier* v. *Pacific Mutual*, *Paradise* v. *Travelers*, *Schifter* v. *Commercial*, above, and *United States* v. *Patryas*, 303 U.S. 341.

C. These unindorsed clauses also created ambiguities, which under all cases must be decided favorably to insured. The unindorsed occupation and military clause "free of conditions" leads one untrained in insurance to believe that the aviation rider (if it had been with the policy delivered) did not apply to death in war as a battle casualty. That it did not apply to a risk of war.

N. Y. Life v. *Kaufman*, 78 F.2d 403 cert. denied 80 L.Ed.445; *N. Y. Life* v. *Hiatt*, above; *Mutual Life* v. *Hurni*, 263 U.S., 68 L.Ed.238; *Mutual Benefit* v. *Moyer*, 94 F.2d 907; *Swazey* v. *Mass. Protective Assn.*, 96 F.265; *Gits* v. *N. Y. Life*, 32 F.2d 7.

III

A SUMMARY JUDGMENT FOR INSURER WAS NOT JUSTIFIED

Also, the giving of the summary judgment was prejudicial error for further reasons: The war records (R 102) are not a part of the record for consideration because never admitted in evidence. There is no showing that these were all the war records. At least one was only an "extract" (R 92,97).

As there was no admitted evidence on the manner of death, the summary judgment (R 72) was wholly unsupported, and appellants below were entitled to judgment on that ground also. Even if

the unadmitted deposition and records had been introduced, they fail to show that death came within the aviation rider. The burden was on the company to prove this in every respect. There is no evidence to support Finding of Fact 4 (R 73) that the insured was killed while piloting or in a plane. Death could have been due to injuries received before or after the alleged crash, or from enemy action or shock and exposure after landing (R 68).

CONCLUSION

As stated in brief in the court below, this is not a case where there was any fraud or lack of good faith on the part of the insured. It is the case of a young man, who later made an outstanding and honorable record, and who was anxious to protect his parents and sisters by insurance. We submit that the petition for writ of certiorari should be denied, and the decision and judgment of the Court of Appeals should be allowed to stand.

Respectfully submitted

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Dated March 11, 1950.